

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.66 OF 2006

M/s.Lunawat Bhor Constructions
Pvt.Ltd., A company registered
under the Indian Companies Act 1956,
having its registered Add: 1-A,
Continental Chambers, Karve Road,
Above Chinese Room Hotel,
Erandawane, Pune-411 004.

Through its managing Director:
Mr.Mukund Krisnaji Purandare,
Age : 63 years, Occ.Business,
having Address same as that of
the Company.

...Applicant/
Org.Defendant

Versus

Mr.Pramod Maniklal Lunawat,
Age:43 years, Occupation:Business,
having Add:107/29, Erandawane,
Pune-411 004.

...Respondent/
Org.Plaintiff

.....

Mr.M.M.Sathaye for Applicant.

Mr.A.A.Kumbhakoni with Mr.Tejas Deshmukh i/b
M/s.Ram & Co. for Respondent.

.....

CORAM: A.M.KHANWILKAR, J.

JANUARY 18, 2007.

ORAL ORDER :

. Heard Counsel for the parties.

2. This Revision takes exception to the Judgment and Order passed by the Joint Civil Judge, Senior Division, Pune dated 23rd February 2006 below Exhibit 18 in Special Civil Suit No.877 of 2004. By this order, the Trial Court has rejected the application preferred by the Defendant for rejection of the Plaint by exercising powers under Order VII Rule 11(d) of the Code of Civil Procedure. The Court below while answering that issue has adverted to the terms of the supplementary Agreement executed between the parties dated 29th June 1995. The Trial Court has then observed that the cause of action for instituting the Suit accrued in favour of the Plaintiff in April 2004 and as the Suit was instituted in August 2004, the same was within time, for which reason, it could not be thrown out at the threshold being barred by law of limitation. The correctness of this view is put in issue before this Court.

3. For considering the argument canvassed by the parties, it is apposite to advert to the

reliefs claimed by the Plaintiff in the Suit, which read thus:

"HON'BLE COURT BE PLEASED TO DECLARE THAT THE DEFENDANT HAVE NO AUTHORITY TO USE THE TDR AND STAIRCASE FSI OVER THE SUIT PROPERTY AND THE PLAINTIFF ALONE IS ENTITLED TO THE SAME.

THE DEFENDANT, THEIR AGENTS, SERVANTS BE RESTRAINED BY AN ORDER OF PERMANENT INJUNCTION TO CARRYOUT ANY KIND OF CONSTRUCTION OR TO DEAL WITH THE TDR AND STAIRCASE FSI IN RESPECT of the SUIT PROPERTY.

HON'BLE COURT BE PLEASED TO RESTRAIN THE DEFENDANT FROM DISTURBING PLAINTIFF RIGHT OF CONSTRUCTION AND SALE THEREOF.

HON'BLE COURT BE PLEASED TO DIRECT THE DEFENDANT BY AN ORDER OF MANDATORY INJUNCTION TO REMOVE THE ILLEGAL CONSTRUCTION OVER THE SUIT PROPERTY.

INTERIM RELIEFS IN PRAYER CLAUSE "B" BE GRANTED.

COST OF THE SUIT BE AWARDED TO THE PLAINTIFF."

4. After having considered the rival submissions, there can be no doubt that the Court has ample power to reject the Plaint at the threshold in exercise of powers under Order VII Rule 11(d), if it can be demonstrated from the averments in the Plaint that the claim set up in the Plaint is barred by any law. The Counsel for

the Applicant is right in relying on the decision of the Apex Court in the case of **Ramesh B.Desai & Ors. v.Bipin Vadilal Mehta & Ors.** reported in (2006) 5 SCC 638 that the Court can decide the issue of limitation as preliminary issue if the situation so warrants in terms of provisions of Order XIV Rule 2 of the Code of Civil Procedure. In the present case, however, the Trial Court was not called upon to decide the issue of limitation as a preliminary issue, however, the decision was invited by the Defendant on the application to reject the Plaint being barred by law of limitation in terms of Order VII Rule 11(d) of the Code of Civil Procedure. The argument of the Defendant is that from the averments in Plaint particularly Paragraph 3, it can be discerned that the Plaintiffs have clearly asserted that the Defendant could have availed of the rights in respect of staircase FSI and TDR subject to sanction to be granted by the competent authority. That sanction was in fact granted on 5th June 1997 and within three months therefrom, the Defendant could have availed the benefit under Agreement dated 29th June 1995 read with Supplementary Agreement dated 21st

June 1996. It is then stated in Para 3 of the Plaint that the Defendant has failed to avail of the said right within three months i.e. before 5th September 1997. Relying on this assertion, Counsel for the Applicants would contend that the averments in the Plaint clearly indicate that the cause of action for instituting Suit for declaration against the Defendant arose on or about 5th September 1997; whereas, the Suit having been filed on 10th August 2004, was clearly barred by law of limitation. The argument though attractive, will have to be rejected. I am inclined to do so relying on the decision of the Apex Court pressed into service on behalf of the Respondent/Plaintiff in the case of **Gunwantbhai Mulchand Shah & Ors. v. Anton Elis Farel & Ors. reported in 2006 (3) Bom.C.R. 81.** The Counsel for the Respondent has rightly submitted that in the present case, the Suit was for multiple reliefs, it was not only Suit simplicitor for declaration as is canvassed on behalf of the Applicant. I have already adverted to the reliefs claimed by the Plaintiffs in the earlier part of this Order. This submission of the Respondent/Plaintiff will have to be accepted. The

other reliefs including relief of permanent as well as mandatory injunction against the Defendant, whether the Plaintiff would succeed in getting those relief, is a matter for trial. Besides, it is possible to accept the argument canvassed on behalf of the Respondent/Plaintiff that the first relief claimed is in two parts. The first part is one of declaration against the Defendant and the latter part is of declaration that the Plaintiff alone is entitled to utilise the TDR and staircase FSI over the suit property. The latter relief is founded on the assertion that the said right has been assigned to the Plaintiff by the Defendant as well as the Society who is the owner of the suit property and that right is still subsisting in favour of the Plaintiffs. The statement of law enunciated in the decision of the Apex Court in **Gunwantbhai's case (supra)** particularly Paragraphs 8 and 13 thereof persuades me to accept the argument of the Respondent/Plaintiff that in such a situation, the Plaint cannot be thrown out at the threshold by exercising powers under Order VII Rule 11(d) of the Code of Civil Procedure. Accordingly, this Revision should fail. The same is dismissed.

A.M.KHANWILKAR, J.